MEDICAL DISABILITY VERSUS MEDICAL MALPRACTICE: COMPENSATION FOR INJURY/DISABILITY AND THE DEPARTMENT OF VETERANS AFFAIRS

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INTRODUCTION

On December 12, 1994, the Supreme Court invalidated a Department of Veterans Affairs (VA) requirement that a claimant prove his/her disability resulted from negligent treatment by the VA. The Court held that the statute, as drafted by Congress, contained no language mandating a veteran to establish "fault" attributable to a Department of Veterans Affairs Medical Center (VAMC). Effective October 1, 1996, Congress amended the statute so as to require evidence of "fault," i.e., negligence or carelessness, on the part of the VA hospital. What occurred in the interim is of interest to the medical community at large, and notably practitioners in VA hospitals. Because the old law will continue to be applicable in certain circumstances, understanding how disability compensation relates to VAMC care is useful to all physicians who care for veterans.

In seeking monetary compensation for VAMC related injuries, patients generally have two legal avenues to explore: A medical malpractice claim under the Federal Tort Claims Act (FTCA) or a claim for disability benefits under Title 38 of the United States Code, section 1151. Under the FTCA,[1] the injured VAMC patient or his/her survivors can bring a medical malpractice cause of action against the United States for injuries resulting from negligent, omissive, or wrongful acts by government employees acting within the scope of their employment. By virtue of the nature of malpractice causes of action, a finding of negligence or error is required. Under this statute, the governing law is that which exists in the state where the alleged malpractice occurred.

By comparison, the law governing veterans' disability benefits is uniform throughout the United States, and is adjudicated, not by the federal district courts as are FTCA claims, but by the laws governing the administration of veterans benefits as determined by the Department of Veterans Affairs (VA). When disputes between the VA and the veteran arise, the Board of Veterans Appeals (BVA) makes a determination which, if unfavorable to the veteran, can then be appealed to the U.S. Court of Veterans Appeals (CVA).[2] Claims by veterans for service-connected injuries or disabilities, as opposed to negligent hospital care, are only handled by the VA. Tort claims for lump sum monetary compensation for negligence are only handled under the FTCA. Claims for compensation for negligent hospital care related to a service connected disability that results in injury and additional disability can be made under either the FTCA or the VA systems, or both. But the question remains, is compensation available for injury or disability that results from VAMC care that is not negligent? Until it was corrected by the Supreme Court in 1994, the VA had required any disability payments associated with VAMC care or treatment to have occurred as the result of negligence, despite the fact that "negligence" was not a requirement that the statute, read literally, mandated. Because of the Supreme Court's decision, the VA was forced to change its regulation. However, Congress has just recently amended the statute, permitting VA's stricter interpretation. The focus of this article is to examine those interim cases where disability had resulted, not from military service or negligent hospital care, but from VAMC treatment, and the law which then governed disability compensation.

THE CASE OF FRED GARDNER[3]

On January 26, 1990, the BVA denied entitlement to veterans disability compensation to Mr. Fred Gardner, a World War II veteran, for the unfortunate residuals of back surgery. Mr. Gardner was not service connected for a back condition, but opted for VAMC treatment. He underwent surgery in June 1986 to relieve radiating back pain caused by a herniated disc in the lumbar spine. Following the procedure, the VA noted neurological damage to the patient's left leg, which further resulted in muscular wasting, leaving Mr. Gardner permanently and totally disabled. It was undisputed that the surgery caused his disability. He filed for disability compensation on that basis, i.e., the left leg condition was a direct result of the back surgery, which had taken place in a veteran's hospital. Under the statute on which Mr. Gardner relied--a statute which dates back to 1924--so long as the leg injury was the result of his VA hospital course, he was entitled to disability benefits, despite the fact that the surgery involved a non-service related back condition. At the time this case was brought, section 1151 read in pertinent part:

> Where any veteran shall have suffered an injury or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment, ... not the result of the veteran's own willful misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, disability or death compensation ... shall be awarded in the same manner as if such disability, aggravation, or death were service connected.

Despite the straightforward language of the statute, the regional office denied Mr. Gardner's claim by relying on a regulation that VA had promulgated to assist in carrying out the laws of the VA as set forth by Congress. The regulation,[4] which interpreted the statute, read in pertinent part:

> Compensation is not payable for either the contemplated or foreseeable after results of approved medical or surgical care properly administered, no matter how remote, *in the absence of a showing that additional disability or death proximately resulted through carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault on the part of VA.* However, compensation is payable in the event of the occurrence of an "accident" (an unforeseen, untoward event), causing additional disability or death proximately resulting from VA hospitalization or medical or surgical care. (Emphasis added.)

Finding that the VAMC had not acted negligently, or otherwise been at fault for the disability, the regional office and the BVA determined that Mr. Gardner was not eligible for disability benefits based on the residual muscle injury he incurred. On appeal, the U.S. Court of Veterans Appeals (CVA) disagreed, emphasizing that the language of the statute as set forth by Congress did not include a reference to "fault" or "negligence".[5] The CVA decision, which strikes down the language of the VA regulation, was later upheld by the Supreme Court, which noted that VA's traditional interpretation deserved little deference as "[a] regulation's age is no antidote to clear inconsistency with a statute."[6]

Thus, the Supreme Court corrected a long time practice of the VA by permitting payment of disability benefits related to VA hospital care, even though the care rendered was not negligent or careless. The following cases further interpreted that statute in light of the Supreme Court ruling, and before Congress took action amending the statute.

THE RESULT OF HOSPITALIZATION

In another case,[7] a World War II veteran was service connected for traumatic arthritis of the right knee that had been re-injured during a military training accident. In 1987, after continuing problems with the knee, he underwent an above-the-knee amputation that was also granted service connection. The discharge summary revealed that the veteran suffered from a "[c]hronically infected right total knee arthroplasty"; however, the examiner specifically mentioned that there was no sepsis. In December 1987, a VA examination characterized the right stump as "completely healed." He was admitted to the VAMC in February 1990, complaining of increasing pain in the right stump area; x-rays revealed a metastatic disease in his right pelvis, and he underwent a prostate biopsy. The veteran died on March 19, 1990.

According to the death certificate, the immediate cause of death was sepsis. Metastatic cancer of the prostate was listed as a significant condition contributing to death but not resulting in the underlying cause given. The autopsy described the right stump as "healed and grossly ... unremarkable." The VA discharge summary indicated that the prostate biopsy instrumentation resulted in the veteran's development of septicemia, and also noted that a urinary tract infection due to instrumentation resulted in septicemia. A June 1990 pathology consultation report listed acute and chronic renal failure with urinary tract infection and septicemia among its diagnoses.

The veteran's wife filed a claim for widow's benefits, alleging that her husband's death was related to his service connected condition. However, the BVA denied service connection for the cause of the veteran's death. While the Court found no error in the Board's determination that the veteran's service connected amputation was not the principal or contributory cause of death, the claim was remanded to determine whether §1151 could apply to grant benefits. The Court emphasized the language of the statute, and opined that his death resulted from septicemia caused by VA instrumentation, i.e. "as the result of hospitalization, [or] medical or surgical treatment[.]" As held in *Gardner*, there is no fault or negligence requirement in applying §1151 as it was then written, only causation.

SUBMITTING TO TREATMENT

In *Sweitzer v. Brown*,[8] a veteran had reported to the radiology department of a VAMC for a scheduled upper gastrointestinal x-ray examination. After being advised that there would be a twenty minute wait, he opted to take a walk throughout the facility. While looking at a bulletin board on the building's first floor, an unidentified patient in a motorized wheelchair rounded the corner, struck Mr. Sweitzer in the lower torso, and knocked him to the ground. He immediately reported the incident to hospital personnel and received medical attention for the lower back pain which had commenced after the wheelchair collision. A lumbar spine x-ray revealed degenerative joint disease, but no fracture. Moreover, there was no focal tenderness and his gait was normal. Nevertheless, he continued to receive outpatient treatment and physical therapy for continual low back pain.

Several months after the incident, he filed a claim for veterans disability benefits under section 1151 on the grounds that the back condition, while not service connected, suffered aggravation as a result of the wheelchair mishap in a VA medical center. The VA regional office disagreed, concluding that his non-service connected back disability was not the result of a VA authorized hospitalization, treatment, or examination, and thus denied his claim for disability compensation. Mr. Sweitzer appealed to the U.S. Court of Veterans Appeals, which agreed with the regional office. The CVA opinion holds that appearing for a medical examination at a VA hospital does not constitute submitting to an examination, and further that "Section 1151 is not broad enough to encompass the factual situation presented in this case.... [The] appellant suffered an injury that was

coincidental to his reporting for an examination, rather than one that was a result of [his] having submitted to an examination."

WILLFUL MISCONDUCT EXCEPTION

An exception to awarding disability compensation for injury incurred during VAMC hospitalization or treatment under section 1151 is where the veteran's own "willful misconduct" results in injury or an aggravation of an injury. In 1992, the Court of Veterans Appeals affirmed a BVA decision denying benefits under section 1151 for disability related to blindness of the left eye due to surgical treatment for a detached retina.[9] The veteran was treated from April 2-8, 1989, at the VAMC. In the discharge summary, the doctor stated:

> Three weeks ago he noticed floaters in the left eye and ten days ago, he [experienced an] acute decrease in vision in the left eye and has had that ever since. He saw [a physician on March 31] who diagnos[ed] retinal detachment o[cular] s[inister] left eye with macula off and he was unable to get to the VA Hospital until the day of admission.

The summary also noted that the veteran underwent a scleral buckle procedure of the left eye without complication on April 4, 1989, after the risks and benefits had been explained to him, and that on April 8, 1989, the veteran "was discharged with the vision of count fingers in the left eye." Follow-up was scheduled for April 17, 1989, in the Retina Clinic, and the veteran was told to wear glasses or a Fox shield and to do no heavy straining or lifting.

In September 1989, the veteran informed the VA that he intended to file a malpractice claim for the 80% vision loss in his eye, which the regional office construed as a claim for service connection. A memorandum from the Chief of the Ophthalmology Section outlined the patient's history and care rendered, and further emphasized;

> [The patient] was informed that since his retinal detachment was long standing and had not been addressed immediately upon its diagnosis, that the prognosis for obtaining good vision post-operatively was very, very poor. All the risks and benefits of retinal detachment surgery were explained and the patient chose to attempt surgical repair.... The surgical procedure was anatomically and technically completely successful.
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> ... The patient was discharged with clear instructions for use of his topical eye medication as well as his systemic medications and given an appointment for follow-up on April 17, 1989, in the Retina Clinic. According to the chart, he did not show up for that appointment and to my knowledge, has not been seen nor made an attempt to be seen at this clinic since discharge.
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> In summary, I believe that he received prompt, competent, and professional management of his problem. His poor visual results cannot be related to any deficiency in his care but rather relate to the nature of his disease upon admission, and most importantly, the fact that he did not seek surgical care in a timely fashion after the correct diagnosis was made by a doctor outside the hospital.

The VA regional office denied service connection, stating that it was the veteran's "failure to seek care in a timely fashion" that resulted in his vision loss, not the treatment rendered by the VAMC. This was upheld by the BVA. While the Court did not *hold* that the veteran's actions amounted to willful misconduct, the BVA nevertheless was affirmed because the veteran had failed to present sufficient evidence "that the loss of his vision was the result of surgery performed by VA doctors."

THE NEW LAW

Section 1151 was amended effective October 1, 1996.[10] Congress deleted the first sentence, and added, *inter alia:*

> (a) ... For purposes of this section, a disability or death is a qualifying additional disability or qualifying death if the disability or death was not the result of the veteran's willful misconduct and --
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> (1) the disability or death was caused by hospital care, medical or surgical treatment, or examination furnished the veteran under any law administered by the Secretary ... and the proximate cause of the disability or death was --
>
> (A) carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of the Department in furnishing the hospital care, medical or surgical treatment, or examination; or
>
> (B) an event not reasonably foreseeable.

The changes clearly reflect Congress' intent to include an element of fault in VAMC related disability determinations.

How the new law and any subsequent VA regulations will affect future disability determinations related to VAMC care remains to be seen. As a practical matter, VA will most likely return to the pre-*Gardner* method of adjudicating claims, where "negligence" or "fault" was a requirement. Nevertheless, as the new law became effective only after October 1, 1996, any claims filed prior to that date will still be governed by the old law. In future cases, the court will determine how the new law will be interpreted.

REFERENCES

1. 28 U.S.C. §1346(b) (1995).
2. For additional information on the creation and jurisdiction of the U.S. Court of Veterans Appeals, see Frank Q. Nebeker, Jurisdiction of the United States Court of Veterans Appeals: Searching Out the Limits, 46 Me. L. Rev. 5 (1994).
3. *Brown v. Gardner*, 115 S.Ct. 552 (1994).
4. 38 C.F.R. § 3.358(c)(3) (1991).
5. *Gardner v. Derwinski*, 1 Vet. App. 584 (1991).
6. *Brown v. Gardner*, 115 S.Ct. at 557.
7. *Stoner v. Brown*, 5 Vet.App. 488 (1993).
8. 5 Vet.App. 503 (1993).
9. *Ross v. Derwinski*, 3 Vet.App. 141 (1992).
10. Department of Veterans Affairs, Pub. L. No. 104-204, §110 Stat 2874, 2926 (1996) (to be codified at 38 U.S.C. §1151).